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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 41

GENERAL UTILITIES AND OPERATING COMPANY, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 31–39) is reported in 29 B. T. A. 934. The opinion of the Circuit Court of Appeals (R. 50–59) is reported in 74 F. (2d) 972.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 9, 1935. (R. 59–60.) A petition for rehearing was filed February 6, 1935 (R.

60), and was denied April 2, 1935 (R. 60–61). The petition for a writ of certiorari was filed May 3, 1935, and granted June 3, 1935 (R. 61–62).. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner was the owner of 20,000 shares of stock in another corporation which had appreciated in value in petitioner's hands in excess of $1,000,000. Petitioner secured a purchaser for the stock and arranged the details of sale. Thereupon, pursuant to corporate resolution, petitioner distributed all but 910 shares of the stock to its stockholders and at the same time submitted for their approval a written agreement embodying the terms and conditions of sale, which covered all, but not part, of the shares. The agreement was signed by petitioner and all of the stockholders and the consideration was paid to them in proportion to their several interests.

Upon these facts the questions presented are: Whether petitioner realized a taxable gain (1) upon the disposition of the 19,090 shares to its stockholders; or (2) upon the sale of those shares to the purchaser.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 42–43.

STATEMENT

The following facts were stipulated by the parties (R. 9–20), and were included in substance in the Board's findings of fact (R. 32–36):

The petitioner is a Delaware corporation, with its principal offices in Baltimore, Maryland. Petitioner is engaged in the business of owning securities of, managing, and operating public utility properties. (R. 9–10.)

On January 1, 1927, the petitioner corporation acquired 20,000 shares of no par value of the common capital stock, Certificate #C–2, of another corporation, the Islands Edison Company. Said 20,000 shares of stock constituted one-half of the total 40,000 shares of common capital stock of said Islands Edison Company outstanding; the remaining 20,000 shares, Certificate #C–1, were owned by Gillet and Company, Baltimore, Maryland, which company is not connected with petitioner nor with petitioner's stockholders. Petitioner acquired said 20,000 shares of common capital stock of the Islands Edison Company at a cost to it of $2,000 and set up such stock on its books at a total value of $2,000. (R. 10.)

During the month of January, 1928, Walter Whetstone, president of the Southern Cities Utilities Company, became interested in acquiring control of the Compania Electricia de Santo Domingo, the stock of which was owned by the Islands Edison Company. During a conference with J. C. M.

Lucas, president of the petitioner, Mr. Whetstone discussed the purchase of the Santo Domingo Company or the Islands Edison Company common stock and as a result thereof was given permission to make an investigation of the properties of the Santo Domingo Company. Some time in February of 1928, Mr. Whetstone informed Mr. Charles Gillet and Mr. Lucas that his plans required the delivery of all the common stock of the Islands Edison company. He was informed by Charles Gillet that Gillet and Company was ready and willing to make the sale of the 20,000 shares owned by Gillet and Company of the Islands Edison Company common stock, and that he (Gillet) and Mr. Lucas, president of petitioner, had agreed upon the price at which the sale of all the stock of Islands Edison Company would be made. Mr. Whetstone was informed by Mr. Lucas that if a sale of the 20,000 shares of the common stock of the Islands Edison Company then owned by the petitioner was consummated such a sale would be made only after the petitioner had distributed the Islands Edison Company shares to its stockholders, because they had been advised by their attorneys that if sale were made by petitioner it would be subject to a tax on any profit realized on the sale and that when the proceeds of the sale were distributed to the stockholders the stockholders would have to pay another tax thereon. The price to be paid for the properties and generally the terms and conditions of the sale were agreed upon by Messrs. Gillet, Lucas and

Whetstone, but no contract was entered into by them, it being understood and agreed between them that the petitioner would make distribution of the common stock of the Islands Edison Company to its stockholders, and that counsel would prepare a written agreement embodying the terms and conditions of the said sale, said agreement to be submitted for approval to the stockholders of the Islands Edison Company (after the distribution of said stock by the petitioner). (R. 10–11.)

On March 22, 1928, the following transpired at a meeting of the Board of Directors of the petitioner corporation as reflected by the minutes of said meeting (R. 11–13):

* * * * *

> The Chairman called to the attention of the meeting the fact that the Company was carrying on its books 20,000 shares of Common Stock of the Islands Edison Company at a gross valuation of $2,000; he made an extended statement to the Board dealing with the development of and the present condition of the properties of that Company, its record of gross and net earnings and a forecast of the earnings which should be made in the immediate future as a result of extensions of facilities initiated and to a large extent completed; he stated that the officers of the Company after careful analysis of the properties and affairs of the Islands Edison Company, were of the opinion that the Common Stock of that Company which is owned by this Company is worth at

least $1,122,500.00 and should be appreciated on the books of this Company to that amount; he explained that such an appreciation would, of course, involve a credit to surplus account of the Company arising from appreciation of assets and a debit to its asset account in the amount of $1,120,500.00.

The Chairman also suggested to the meeting that the Company consider declaring a dividend on the Common Stock of the Company in the amount of $1,071,426.25, payable out of the appreciation so set up, the dividend to be paid in Common Stock of the Islands Edison Company at a value of $56.12½ a share.

Whereupon the following resolutions were unanimously passed, viz:

(a) that this Company appreciate on its books, its holdings of Common Stock of The Islands Edison Company in the amount of 20,000 shares in the amount of $1,120,500.00 and that the amount of this appreciation be credited to surplus arising from appreciation of assets;

(b) that a dividend in the amount of $1,071,426.25 be and it is hereby declared on the Common Stock of this Company, payable in Common Stock of The Islands Edison Company at a value of $56.12½ a share, out of the surplus of the Company arising from the appreciation in the value of the Common Stock of The Islands Edison Company held by this Company, viz., $1,120,500.00, the payment of the dividend to be made by the delivery to the stockholders

of this Company, pro rata, of certificates for the Common Stock of The Islands Edison Company held by this Company at the rate of two shares of such stock for each share of Common Stock of this Corporation; the stockholders entitled to be those of record at the close of business this day.

* * * * *

The petitioner thereupon, on March 22, 1928, made the entries on its books of account in compliance with the foregoing resolution. (R. 13.)

Thereupon, on March 22, 1928, in accordance with the resolution of the Board of Directors hereinabove set forth, the petitioner distributed to its own stockholders, 19,090 shares of the said common capital stock of the Islands Edison Company, such shares representing two shares of the Islands Edison Company stock theretofore owned by petitioner for each one share of the 9,545 shares of petitioner's own capital stock then outstanding. On such date, March 22, 1928, the said shares of stock were transferred on the stock records of the Islands Edison Company to the individuals receiving the distribution; the certificate, #C–2, theretofore issued to the petitioner was cancelled, and certificates Nos. C–3 to 35 were issued to the thirty-three stockholders of petitioner corporation at that date who received such distribution. (R. 15.)

After transfer of the 19,090 shares as aforesaid, there remained in the hands of petitioner 910 shares of stock of the Islands Edison Company,

which 910 shares were retained by it and a new certificate, #C–36, was issued to it on March 22, 1928. (R. 16.)

On March 26, 1928, the stockholders of the Islands Edison Company (one of which was the petitioner, the owner of 910 shares of Islands Edison Company common stock) and the Southern Cities Utilities Company entered into a contract of sale of The Islands Edison Company common stock. At no time did petitioner agree with the aforesaid Walter Whetstone or the Southern Cities Utilities Company, verbally or in writing, to make sale to him or to the Southern Cities Utilities Company of any of said stock except the aforesaid 910 shares of the Islands Edison Company. (R. 16.)

The fair market value of the Islands Edison Company common stock as of March 22, 1928, was $56.12½ per share. (R. 16.)

The earned surplus from operations as of December 31, 1927, was $1,360,515.96, which amount was not impaired by operating losses prior to March 22, 1928. Such surplus and all the capital of the company at December 31, 1927, were invested at cost in assets of the company, of which assets only $41,152 was cash. On March 22, 1928, the total cash of petitioner was not more than $49,004.23. (R. 17.)

The 910 shares of the Islands Edison Company common stock, Certificate #C–36, which were retained by the petitioner after the said distribution

of 19,090 shares to its stockholders on March 22, 1928, as referred to in paragraph 6 of the stipulation, were sold to the Southern Cities Utilities Company on May 14, 1928, in accordance with the provisions of paragraph 7 of the stipulation, and on which a profit of $46,346.30 was reported on the 1928 return as filed by the petitioner, computed in said return as follows (R. 17):

Sales price of 910 shares at $51.25 per share	$46,437.30
Cost of 910 shares at 10¢ per share	91.00
Profit reported in return	$46,346.30

The difference between the amount of $56.12½ per share, set forth above as the price stated in the contract of March 26, 1928, and the amount of $51.25 as shown in this paragraph as the amount received on May 14, 1928, when sale was made, is represented by brokerage charges, commissions and other expenses incident to the consummation of the sale which were charged against the stockholders in accordance with paragraph Eighth of the contract dated March 26, 1928. (R. 17.)

The petitioner received no cash or other property for the distribution of said 19,090 shares of the Islands Edison Company common stock. (R. 18.)

Petitioner corporation, in making its income tax return for the calendar year 1928, reported no income from the disposition of the 19,090 shares of the Islands Edison common stock. The Commissioner of Internal Revenue, upon auditing said return, held that petitioner corporation derived a profit of $1,069,517.25 from the disposition thereof,

the Commissioner's ruling thereon being in part as follows (R. 18):

> It is therefore held that your corporation realized a taxable gain of $1,069,517.25 upon the distribution of The Islands Edison Company stock in payment of the dividend of $1,071,426.25, as follows:
>
> | | |
> |---|---|
> | Distribution of 19,000 shares of stock at market value of $56.125 a share in satisfaction of dividend obligation | $1,071,426.25 |
> | Cost of stock distributed, $0.10 a share | 1,909.00 |
> | Profit realized | 1,069,517.25 |

The Board of Tax Appeals expunged the deficiency (R. 28–29) on the theory that no taxable gain was realized by the petitioner in the distribution of the stock of the Islands Edison Company to its stockholders (R. 26–28). The Circuit Court of Appeals reversed the Board and sustained the deficiency on the theory that the sale was, in substance, made by the petitioner through the agency of its stockholders. (R. 56–59.)

SUMMARY OF ARGUMENT

Where a corporation invests its funds in property which appreciates in value in its hands, we submit that a distribution of such property to its stockholders is a disposition which may result in gain. There is a closed and completed transaction. The corporation has lost control of the property and is unaffected by subsequent fluctuations in its value. In such circumstances we think that the distribution is such an identifiable event as to

be properly regarded as a disposition. While the petitioner realized no consideration in a tangible form, the increased value was made available to it and petitioner was thus enabled to utilize it for a corporate purpose. For an investment of $1,909 petitioner was able to pay its stockholders the equivalent of $1,071,426.25 in cash, and we submit that petitioner thereby realized the economic benefit which would have followed the actual receipt of the gain in cash. By the distribution petitioner satisfied its general liability to account to its stockholders for the funds invested in the property and its increment.

But if more is necessary, and the form of the dividend declaration is controlling, we submit that petitioner satisfied a specific liability of $1,071,426.25 by the delivery of property costing only $1,909, and that upon well-settled principles petitioner thereupon realized the difference as gain, profit or income within the plain popular meaning of the terms.

In the alternative, and if petitioner failed to realize a gain by using the appreciation to satisfy either a general or a specific liability, then we submit that the sale should be attributed to petitioner. The plan of sale was devised by petitioner. It arranged the terms with the purchaser and prepared the papers. The purchaser desired all, but not a part, of the shares, and since petitioner retained 910 of the shares, it is extremely unlikely that petitioner would have distributed part of the shares if

it would have jeopardized its opportunity to sell the remainder. Petitioner planned a transaction which would insure that its stockholders would get cash, and the only part which the stockholders took in the transaction was to consummate the agreement which petitioner prepared. Under the circumstances, we submit that the distribution to the stockholders was but a step in the sale and that, considering the transaction as a whole, the sale was made by the petitioner through the medium of its stockholders. When they accepted petitioner's plan the stockholders became parties to it and served merely as conduits for conveying petitioner's title to the purchaser. The line between a corporation and its stockholders is not so well marked and so clearly defined that a plan of sale, conceived on the corporate side and there carried to a point just short of consummation, must be deemed to have wholly occurred on the stockholders' side merely because care is taken to complete it there. We think the substance of the transaction was a sale by petitioner and a cash distribution to its stockholders.

Petitioner's contention that the Circuit Court of Appeals was without authority to consider the question whether petitioner made a profit on the sale is predicated on the view that appellate courts lack the power to entertain a different theory from that upon which the case was decided below. We submit that the question thereby raised is one of practice only, and does not involve a limitation of

judicial power. Since the court below entertained the theory, it is settled that this Court will consider it.

ARGUMENT

I

WHERE A CORPORATION PAYS A DIVIDEND IN SECURITIES WHICH HAVE ENHANCED IN VALUE, IT THEREBY REALIZES THE GAIN ON ITS INVESTMENT

Section 22 of the Revenue Act of 1928 (*infra*, p. 42) defines gross income. It includes "gains * * * from * * * sales, or dealings in property * * *." Section 111 (a) (*infra*, p. 42) provides "the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113 * * *." Section 113 *infra*, p. 43) provides, so far as pertinent here, that the basis for determining gain from the "sale or other disposition" of property shall be the cost of such property.

The cost of the property here involved has been stipulated; also the selling price. Accordingly, the problem is simply whether petitioner made a "sale or other disposition". The basis upon which the deficiency was asserted was that petitioner had realized on its property a profit by using it to satisfy a dividend liability of $1,071,426.25. (R. 7.) This theory of the case was rejected by both the Board of Tax Appeals and the Circuit Court of

Appeals because they found no specific liability to pay a dividend in cash. We think that under the facts there was a specific liability. We submit, however, that such a liability is not requisite, because the payment of a dividend discharges a general liability to distribute profits and is a "disposition" which may give rise to gain or loss.

The term "sale or other disposition" embraces all closed and completed transactions. It does not include mere fluctuations in value. *United States* v. *White Dental Co.*, 274 U. S. 398. That case involved the right to a deduction for a loss, and this Court interpreted the statute and regulations as follows (p. 401):

> But with equal certainty they do contemplate the deduction from gross income of losses, which are fixed by identifiable events, such as the sale of property (Art. 141, 144), or caused by its destruction or physical injury (Art. 141, 142, 143) or, in the case of debts, by the occurrence of such events as prevent their collection (Art. 151).

It was held that sequestration of property by the German Government was an event justifying the deduction without the taxpayer's establishing that there was no possibility of eventual recoupment. The rationale of that decision is that any event which terminates the taxpayer's control over the property and prevents future fluctuations from affecting him may properly be regarded as a disposition.

A similar application of the statute was made in *DeLoss* v. *Commissioner,* 28 F. (2d) 803 (C. C. A. 2d). There the taxpayer held stock which became worthless in 1920. He sold a portion in 1920 and the balance in 1921, and claimed a deduction in each year, relying upon the literal language of the statute as always permitting losses upon sales. But the Circuit Court of Appeals held that a sale under such circumstances was necessarily fictitious and established nothing, for when a security can no longer fluctuate in value, there is no variable to determine, and to extend the usual doctrine to the extent contended for would serve only to allow a taxpayer to manipulate his loss. Accordingly, it was held that the loss upon the shares sold in 1921 was sustained in 1920.

Those cases deal with losses, but we submit that they are equally applicable to gains, since gains and losses are correlative and are governed by the same concepts. Here the petitioner disposed of its property by a transfer which made it impossible for future fluctuations in value to affect petitioner. Whether the stock increased in value thereafter or whether subsequently it became worthless, had no further economic effect upon petitioner. Petitioner invested its funds in the stock and the appreciation in its value up to the time of the transfer was the full measure of the economic result of the investment. We submit that the transfer was an identifiable event which clearly falls within the term "sale or other disposition." The trans-

action was closed and the transfer served as an occasion for determining gain.

It is true that the Court of Appeals for the District of Columbia reached a contrary conclusion in *First Sav. Bank of Ogden* v. *Burnet*, 53 F. (2d) 919, although it recognized that (p. 920) "This question is not free from doubt", and conceded (p. 921) that "It is true that the rule hereby adopted leads to an anomalous result." There a corporation invested funds in securities which declined in value, whereupon the corporation distributed them to its stockholders as a dividend and claimed as a deduction the difference between cost and the market value on the date when the transfer to the stockholders occurred. Applying the rule of *ejusdem generis* the court construed the phrase "sale or other disposition" to relate only to such dispositions of property as are like sales. Because the stockholders paid no consideration for the securities they received as a dividend, and because no cash dividend was declared which the securities were used to satisfy, the court concluded that the transfer in question was not within the statutory language.[1]

[1] Support for this result was found in the Treasury Regulations dealing with distributions in kind upon dissolution, because in the opinion of the court there was no difference in principle between such distributions in dissolution and similar distributions not in dissolution. This reasoning ignores the distinction between ordinary and liquidating dividends made by the Regulations themselves and recognized by this Court in *Hellmich* v. *Hellman*, 276 U. S. 233. The rea-

If losses are not sustained in such transactions, it would follow that no gain is realized unless the dividend is first declared in cash. But it seems to us that the entire situation should be re-examined with a view to ascertaining if there is not a basis whereby both gains and losses should be recognized in such transactions. Where the property declines in value in its hands a corporation which distributes it as a dividend has suffered an economic loss as surely as though it disposed of the property by sale. It has lost control of the property and remains unaffected by further fluctuations. If such an event does not constitute a basis for a loss there will be no later occasion upon which the corporation may predicate its claim.

Similarly, where the property has increased in value in its hands and a corporation distributes it as a dividend, it has derived an economic gain to the same extent as though it had disposed of the property by sale, and if the gain is not taxed at that time, the amount by which the property has appreciated in value will never be subject to tax, for the property takes a new basis in the hands of the stockholders, namely, the value at the time of distribution.

It is not open to doubt that the phrase "sale or other disposition" connotes a transfer by which a

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son why no gain is recognized upon even a partial liquidation is that the stock is surrendered and it is a capital transaction, from the standpoint of both the corporation and the stockholders.

gain is realized or a loss is sustained, and one of the principal reasons for rejecting the suggestion that a dividend distribution is a "disposition" has been the circumstance that the stockholders pay no consideration to the corporation, and hence there is no actual receipt of gain in a tangible form.[2] We think that this reasoning misses the point, for in making it available to its own stockholders the corporation is realizing the appreciation, and nothing more is necessary. It is our view that the addition to surplus on account of the increased value and the distribution of this increased value in satisfaction of the company's general liability to its stockholders, are the evidence that the gain has been real-

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[2] The proposition of taxing distributions in kind by corporations on a more equitable basis received favorable consideration by a subcommittee of the Committee on Ways and Means of the House of Representatives, but was not finally recommended because "no plan has been devised which overcomes constitutional objections." Preliminary Report, submitted December 4, 1933, House Committee Print, 73d Cong., 2nd Sess., "Prevention of Tax Avoidance", Item (32) (c), p. 23.

In a Statement of the Acting Secretary of the Treasury commenting on this report it was said (Item (32) (c), p. 17):

> The Department submits that the treatment of corporate distributions in kind be not changed. Any taxation of such dividends to the corporation would, in the opinion of the Department, be unsound as an income-tax measure, and furthermore would be of doubtful constitutionality.

We do not share the doubts expressed above. If, as we contend, the corporation realized the appreciation in value, the constitutional question necessarily disappears.

ized, for it is incomprehensible how a corporation can distribute to its stockholders something which it has not itself received. Petitioner had an earned surplus equivalent to the value of the stock distributed. (R. 24.)

The derivation of income may be evidenced by other things than the receipt of tangible property, and where one receives economic benefits equivalent to actual receipt of income there is the legal equivalent of actual receipt of income which affords a basis for the tax. The cases involving constructive receipt are a familiar illustration of this principle. Many of them were collected and cited with approval in *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716, 729, where it was held that the payments by a corporation of its president's taxes constituted income to the officer, although he never received or had a right to receive the money. It was enough that it was used for his benefit. In *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, there was no actual receipt during the taxable year, but a reserve which was already in the company's possession was released to the free use and benefit of the corporation, which was held to be the equivalent of receipt. Similar situations existed in *Charleston & W. C. Ry. Co.* v. *Burnet*, 50 F. (2d) 342 (App. D. C.), and *Chicago, R. I. & P. Ry. Co.* v. *Commissioner*, 47 F. (2d) 990 (C. C. A. 7th); and in each case a like decision was reached. In *American National Co.* v. *United States*, 274 U. S. 99, this Court apparently approved the company's practice

of reporting as income the interest which the company had set up as a liability on its books but was not required to pay because the notes were satisfied before maturity. In *United States* v. *Kirby Lumber Co.*, 284 U. S. 1, the question was presented whether income had been realized by a corporation which purchased its bonds at less than par. This Court held that the corporation made a clear gain, and said (p. 3):

> The defendant in error has realized within the year an accession to income, if we take words in their plain popular meaning, as they should be taken here.

In some respects this case is not unlike *United States* v. *Phellis*, 257 U. S. 156. There the taxpayer was a stockholder of a New Jersey corporation which transferred its assets for stock in a new corporation. The New Jersey corporation distributed to the taxpayer some of the new stock and its value was treated as income in his hands, despite the fact that the value of his new stock, plus the value of his New Jersey stock after the distribution, was no greater than the value of his New Jersey stock alone before the distribution. This Court said (p. 174):

> It was a part of the purpose and a necessary result of the plan of reorganization, as carried out, that common stock of the new company to the extent of $58,854,200 should be turned over to the old company, treated by it as assets *to be distributed as*

> *against its liability to stockholders for accrued surplus,* and thereupon distributed to them "as a dividend." The assent of the stockholders was based upon this as a part of the plan. (Italics ours.)

No cash dividend was declared in that case, but the dividend in stock of another corporation was treated as satisfying the corporation's general liability to stockholders for accrued surplus. A similar liability existed here, which was satisfied by the dividend in stock. Petitioner's investment increased in value; petitioner carried the increase to its surplus where it appeared as an asset; and we submit that petitioner realized the economic benefit that would have followed the actual receipt of the gain in cash. For an investment of $1,909 petitioner was able to pay its stockholders a dividend of $1,071,426.25, and we submit that petitioner thus realized the difference as gain, profit or income within the "plain popular meaning" of the words.

Eisner v. *Macomber,* 252 U. S. 189, does not militate against these views. The definition of income there announced is satisfied here. It was there held that the gain must be derived and realized from the investment. We submit that petitioner derived and realized a gain here because the gain was made available to it and petitioner was enabled to deliver it to its stockholders and thus serve its primary corporate function.

Our argument necessarily rests upon the relationship between the corporation and its stockholders. While separate entities for the purpose of the taxing statute, there is nevertheless a relationship which makes it possible for the corporate entity, without severing the appreciation, to utilize it by transferring it to its stockholders, who thus derive the gain from their corporation. A corporate distribution consisting of shares of another corporation is equivalent to the distribution of a like amount of money. This is certainly true from the standpoint of the stockholders (*Peabody* v. *Eisner*, 247 U. S. 347, 350), and we think it is equally true from the standpoint of the corporation. The value of the property at the time of distribution is the basis for gain or loss in the hands of the stockholders. Their accountability for other than derivative income begins only then. They account for all increase in value thereafter, and we submit that the appreciation while in the corporate custody must be accounted for by the corporation.

Nor would the rule for which we contend open any door to tax avoidance. Under the present decisions a corporation may take a loss upon the payment of a dividend by the simple device of first declaring a cash dividend in the then market value of property and thereafter paying the dividend by the distribution of property which has cost more. *Callanan Road Improvement Co.* v. *Commissioner*, 12 B. T. A. 1109; *Bacon-McMillan Veneer Co.* v. *Commissioner*, 20 B. T. A. 556. Thus, under the

present rule losses may be taken by paying dividends in property which has declined in value; but, if the decision below is correct, the converse is not true, and there can be no tax upon the distribution by a dividend of property which has enhanced in value. The vice of this situation is obvious, for it establishes a rule which depends upon the form of the dividend declaration and thus puts in the hands of a corporation the power to use the rule in a manner which will always work to its advantage. A distinction depending upon the form of a corporate resolution is unreal. There is no difference of substance. In both cases the dividend is paid from corporate surplus and the stockholders are chargeable with income measured by the market value of the property received. From the corporation's standpoint the question is whether or not the increased value has become available to it. This cannot depend upon the form of the dividend declaration. We think it should depend upon whether the payment of the dividend is a disposition—a corporate use from which the corporation realizes the fruits of the investment.

The question which confronted this Court in *Burnet* v. *Wells,* 289 U. S. 670, turned upon the use to which certain income was put. There the income of a trust was attributed to the grantor insofar as it had been applied to the maintenance of insurance on his life, because the use to which it was put gave him (p. 679) "something fairly to be dealt

with as equivalent to ownership". The decision that the income was used for his benefit was thus stated (pp. 680–681):

> He devoted it at the same time to the preservation of his own contracts, to the protection of an interest which he wished to keep alive. The ends to be attained must be viewed in combination. True he would have been at liberty, if the trusts had not been made, to put an end to his interest in the policies through nonpayment of the premiums, to stamp the contracts out. The chance that economic changes might force him to that choice was a motive, along with others, for the foundation of the trusts. In effect he said to the trustee that for the rest of his life he would dedicate a part of his income to the preservation of these contracts, so much did they mean for his peace of mind and happiness. Income permanently applied by the act of the taxpayer to the maintenance of contracts of insurance made in his name for the support of his dependents is income used for his benefit in such a sense and to such a degree that there is nothing arbitrary or tyrannical in taxing it as his.

The relation between the parties and the tendency of the transfer to give relief from obligations which are recognized as binding by normal men and women are facts to be considered in determining tax liability. *Burnet* v. *Wells, supra,* p. 682. In the light of these principles, we submit that the increased value here involved was utilized by peti-

tioner "in such a sense and to such a degree" that there was the legal equivalent of its realization; for petitioner thus satisfied its obligation to account at some time to its stockholders for this $1,909 investment and its increment.

It is clear that petitioner used the increased value for a corporate purpose, and was thereby enabled to pay its stockholders $1,071,426.25. Thus was petitioner serving the principal end for which it was organized—to earn profits which it could distribute to its stockholders—and we submit that in so justifying the hopes of its organizers this economic entity, called a corporation, truly derived an economic gain.

We have been contending that the form of the dividend declaration is not important. However, if the distinction is sound between (a) satisfying a cash dividend by a payment in property and (b) the distribution of a dividend in property without the prior declaration of a cash dividend, we submit that in appreciating the actual value of the stock on its books and declaring a dividend in the amount of that appreciation, the petitioner was declaring a cash dividend.

Upon the declaration of a cash dividend a corporation becomes indebted to its stockholders in the amount declared. *Flynn* v. *Haas Bros.*, 20 F. (2d) 510, 511 (C. C. A. 9th); *Staats* v. *Biograph Co.*, 236 Fed. 454 (C. C. A. 2d); *Hopper* v. *Sage*, 112 N. Y. 530, 533–534, 20 N. E. 350, 351; *King* v. *Paterson and Hudson River Railroad Co.*, 29 N. J. L. 82,

affirmed, 29 N. J. L. 504. Accordingly, when it satisfies such a debt by distributing property which has cost less than the amount of the declared dividend, a corporation has satisfied a specific obligation for less than its face, and has realized income upon the principle of the *Kirby Lumber Co.* case, *supra.* The difference between the amount of the liability satisfied and the cost of the property used for the purpose represents income derived by the corporation just as much as if it had sold the property for cash. In effect the transaction is a sale of the property for the debt and the amount received, to wit, the debt, less the cost of the property, constitutes taxable income.

Here the petitioner's officers had determined that the Islands Edison stock had increased in value from the original cost of $2,000 in January, 1927, to an amount of $1,122,500, justifying an increase in surplus of the difference. (R. 3.) There could be little doubt that this was the fact, since there was a purchaser ready and willing to buy at the larger figure. By corporate resolution the petitioner credited to surplus the appreciation in value and then declared a dividend in the amount of $1,071,426.25 out of such surplus. The petitioner thus recognized that it had sufficient surplus to support a dividend of $1,071,426.25 and declared a dividend of that amount.

We submit the circumstance that the obligation was declared to be payable in a certain manner, that is, in "Common Stock of the Islands Edison

Company at a valuation of $56.12½ a share" (R. 12–13), does not change the fact that an obligation of a specific amount was incurred by the petitioner. Because of this recital the petitioner had the right to satisfy the obligation by transferring the Islands Edison Company stock in accordance with the description. But if it refused to do so or put it beyond its power to pay in such manner, the stockholders could recover the specific sum declared. Cf. *Beckwith* v. *Sheldon*, 168 Cal. 742; *Whitsett* v. *Forehand*, 79 N. C. 230; *Heywood* v. *Heywood*, 42 Me. 229. We contend that the dividend resolution resulted in a situation in which the petitioner created an obligation of a specific amount, reserving the right to pay in a certain manner. When such a situation obtains, the stock is not distributed as a dividend in kind but is delivered in payment or discharge of a debt due from the corporation to the stockholders. In this respect the case differs from *First Sav. Bank of Ogden* v. *Burnet*, *supra*.

The case of *The State* v. *Balt. and Ohio R. R. Co.*, 6 Gill (Md.) 363, upon which the court relied, is not authority against our contention. There the corporation had declared a dividend of 3% to be paid in cash to holders of less than 50 shares, and one-third in cash and two-thirds in bonds to holders of more than 50 shares. The court held that a larger stockholder could not recover the whole of its dividend in cash where it relied upon the dividend declaration as the basis of its action, since thereby it ratified the dividend as declared. But in

that case the corporation did not deny the liability to pay in bonds, nor did it appear that the stockholder had demanded or had been refused payment in such a medium. The court did not hold that the stockholder would have no right to demand cash if the corporation had refused or was unable to pay in the manner indicated, since that question was not involved.

The Board's decision is directly contrary to its former decision in *Bacon-McMillan Veneer Co.* v. *Commissioner, supra.* There the corporation directors resolved that "a fifty percent dividend be declared, and made payable in Liberty Loan Bonds in denominations of $1,000.00 each, at their market value this date, and all odd hundreds of dollars and cents in cash" (p. 557); and the resolution was carried into effect. The Board held that this constituted the creation of an obligation and a satisfaction thereof by payment in bonds, giving rise to taxable income. We contend that this represents the correct view, and it should have been followed by the Board and by the Circuit Court of Appeals in the instant case.

Commissioner v. *Columbia Pacific S. Co.*, 77 F. (2d) 759 (C. C. A. 9th), deals only with the question whether the form of the dividend was such as to create a cash liability which was satisfied at a profit. So far as the form of the dividend resolution is concerned, the facts in the two cases are not distinguishable and we submit that the decisions are unsound.

II

THE SUBSTANCE OF THE TRANSACTION WAS A SALE BY PETITIONER AND THE DISTRIBUTION OF CASH TO THE STOCKHOLDERS

In the alternative, and if petitioner failed to realize a gain by using the appreciation to satisfy a liability, then we contend that the sale must be attributed to petitioner.

There was an investment by petitioner in stock which increased in value while still in its hands. It carried the increase to its surplus, where it appeared as an asset. There was a sale by which the increase in value was realized, and while petitioner did not actually receive the cash consideration, it did receive every economic benefit that would have followed the actual receipt of the cash.

The sale would not have been made without the distribution to the stockholders; the distribution would not have been made without the sale. Since the sale could only have been made by delivery of all of the stock, it is extremely unlikely that petitioner would have distributed part of the stock if it would have jeopardized its opportunity to realize upon the 910 shares it retained.

It was clearly intended to give the stockholders cash, and petitioner made arrangements accordingly. The petitioner turned over the property to the stockholders, having arranged to supply the purchaser. Having arranged for a sale, petitioner introduced a wholly artificial step into the transac-

tion. The stockholders took the property, with a sales contract ready for their signatures, and they completed the sale in pursuance of petitioner's plan.

We think it is necessary to view the transaction as a whole and that a single transaction does not change its character because it involves separate steps. The word "transaction", this Court has said, "is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." *Moore* v. *N. Y. Cotton Exchange,* 270 U. S. 593, 610. By accepting the petitioner's plan the stockholders became parties to it, and it is unnecessary that two steps so intimately related as these should be treated as if they had no connection. We submit that the two steps in the marketing of this stock were so welded together as to constitute one transaction, and that in substance petitioner sold its stock and distributed cash to its stockholders.

Applying the principle that the substance of the transaction must prevail over the form, the courts have not hesitated to treat separate steps in a preconceived plan as parts of a single transaction.

In *Tulsa Tribune Co.* v. *Commissioner,* 58 F. (2d) 937 (C. C. A. 10th), it was held that the purchase of a newspaper in November, 1919, and its transfer in 1920 to a corporation formed by the purchaser was a single transaction. The court said (p. 940):

> As it seems to us, the attempt to break this transaction up into two elements by saying that Jones bought the property and then transferred it to the corporation in exchange for its capital stock is not only unfair, but untrue.

It was held that the corporation issued its stock for cash.

In *Prairie Oil & Gas Co.* v. *Motter,* 66 F. (2d) 309 (C. C. A. 10th), the taxpayer purchased the stock of the Olean Petroleum Company for cash. The next day (April 1st) the Olean Petroleum Company transferred its assets to the taxpayer and dissolved. In answer to the contention that the purchase of the stock of Olean and the transfer of Olean's assets should be separately considered, the court said (p. 311):

> To avoid this conclusion the collector then undertakes to separate the component parts of this single transaction. He ignores the fact that the contract declares the purpose of the transaction to be the acquisition of the leases; that possession of the leases was delivered as of a date prior to the contract; that the Olean had $700,000 of other assets not bargained for or acquired; that the stock was delivered under an optional arrangement to accomplish the transfer of the leases; and that the charter was surrendered the day after the stock was delivered. His position is that the court should close its eyes to the events prior to April 1st, and consider only the fact that the Prairie owned all the

> Olean stock on that day; that it then transferred to the Prairie all its properties in consideration of a cancellation of its stock. If a taxpayer sought to avoid a tax on the profits of such a sale as this by asking the Commissioner to ignore the actualities, he would shortly and properly be reminded that taxation is an intensely practical matter and that the substance of the thing done, and not the form it took, must govern.

Accordingly, it was held that Olean's assets were acquired for cash.

In *American Security & Trust Co.* v. *Tait*, 5 F. Supp. 337 (Md.), a transaction involving the merger of a bank and a trust company took the form of a transfer of the bank's stock to trustees; a transfer of the bank's assets to the trust company for cash equivalent to $400 per share of bank stock; the employment of the cash to purchase the trust company's stock; and finally a distribution of the trust company's stock to the stockholders of the bank. The taxpayer contended that the transaction was a sale of bank stock at $400 per share; but the court held that the entire transaction must be taken into account, and said (p. 340):

> This contention is clearly untenable. In effect it divides an indivisible contract into two separate contracts, one of sale of the Bank stock at $400 a share and the other a subscription at the par of $100 to four shares of Trust Company stock, each having a market value of $220 per share. To treat an

> entire and indivisible contract this way not only violates the elementary rules of the construction of contracts but from the economic standpoint, injects an atmosphere of unreality in erecting the hypothesis that a stockholder who could obtain a value equal to $880 per share for his Bank stock actually sold it for $400.

The statute taxes the gain realized on a sale or other disposition. Here it is clear that there was a sale upon which gain was realized, and although care was taken to complete the transaction by the signatures of the stockholders, all the other essentials were completed by the corporation. In such a situation we think the statute is broad enough to attribute the sale to the corporation. In *Horning* v. *District of Columbia,* 254 U. S. 135, this Court sustained a conviction for doing business as a pawn broker in the District of Columbia without a license, although the loans were made in every case outside the District of Columbia. This Court held that the statute was not confined to cases where the whole business was done in the District of Columbia, and said (p. 137):

> If an essential part of it is done there and a Washington office is used as a collecting centre, it does not matter that care is taken to complete every legal transaction on the other side of the Potomac.

We submit that if a criminal statute (c. 26, 37 Stat. 657, Sec. 1) making it an offense "to en-

gage in the District of Columbia in the business of loaning money * * * without procuring license" was broad enough to cover loans initiated in the District of Columbia but consummated outside, then *a fortiori* is this taxing statute, requiring no scienter, to be construed as equally applicable to sales initiated by this petitioner even though consummated by its stockholders.

The line between a corporation and its stockholders is not so well marked and so clearly defined that a plan of sale conceived on the corporate side and there carried to a point just short of consummation must be deemed to have wholly occurred on the stockholders' side merely because care is taken to complete it there.

The court below found justification for the tax by treating the stockholders as agents in making the sale. We do not think it is important or necessary that a legal classification be applied to this situation, but much support for the agency concept can be found in the decisions.

This is not a case in which a corporation had distributed assets to its stockholders, who thereafter find and sell to a purchaser. This is a case in which the petitioner found a purchaser, arranged the terms of sale, and, through its counsel, prepared the written agreement for its stockholders to sign. One of the terms of sale was that the title must pass through the stockholders in order that the petitioner might escape the income tax on the gain,

i. e., the appreciation of the value which had occurred while it held the stock. The plan required the delivery of all of the stock. All of the stockholders joined in and ratified the plan by signing the contract which petitioner had prepared. There is nothing in the record to indicate that the petitioner would have made a distribution of the stock to its stockholders except as a step in a larger plan of sale; the clear inference is otherwise. The plan, we submit, was one of sale; the distribution was incidental and was a method of passing the profit on to the stockholders; this latter would probably have occurred later, and petitioner might have been confronted with the necessity of making it shortly thereafter under the compulsion of Section 220 of the Revenue Act of 1926 (c. 27, 44 Stat. 9; U. S. C. App., Title 26, Sec. 961), or Section 104 of the Revenue Act of 1928.

Under this factual situation, we submit that the stockholders were mere agents in the transaction. Cf. *Beers* v. *McNaught*, 162 N. Y. Supp. 514. In determining whether agency does, or does not, exist "forms are not important. Courts will look to the actual transactions." *Fenner & Beane* v. *Holt*, 2 F. (2d) 253 (C. C. A. 5th), certiorari denied, 267 U. S. 605. Agency is frequently implied. *Radio Corporation of America* v. *Radio Audion Co.*, 284 Fed. 581 (Del.). It is not necessary that the principal retain control over the agent. *S. B. McMaster, Inc.* v. *Chevrolet Motor Co.*, 3 F. (2d)

469, 476 (E. D. S. C.). Cf. *Rollins* v. *McDonald*, 7 F. (2d) 422 (C. C. A. 1st). It is not necessary that the parties understand the relationship to be one of agency. *Daugherty* v. *Wiles*, 207 S. W. 900, 902 (Tex.). No express appointment or acceptance is necessary to the relationship. *B. & O. R. Co.* v. *Steel Co.*, 138 Md. 604, 611; *Wilson* v. *Haun*, 97 Kan. 445. It is not necessary that the agent be compensated for his services. *Napier* v. *Patterson*, 198 Iowa 257.

Where one person, in order to shield himself from liability, uses another as a figurehead in making a sale, the relationship of principal and agent exists, and the sale will be considered as made by the principal. *Farnham* v. *Akron Tire Co.*, 98 Wash. 484. This result has been reached in substance in numerous cases. See *Asiatic Petroleum Co.* v. *Commissioner* (C. C. A. 2d), decided August 16, 1935, not yet officially reported, but may be found in C. C. H. (1935), Vol. 3–A, p. 10,372; *Rand* v. *Helvering*, 77 F. (2d) 450 (C. C. A. 8th); *Atkins* v. *Commissioner*, 76 F. (2d) 387 (C. C. A. 5th); *Shoenberg* v. *Commissioner*, 77 F. (2d) 446 (C. C. A 8th)[3]; *Esperson* v. *Commissioner*, 49 F. (2d) 259 (C. C. A. 5th), certiorari denied, 284 U. S. 658. We submit that the court below was correct in inferring that the stockholders acted as agents for

[3] Certiorari denied October 14, 1935, No. 141, October Term, 1935.

the petitioner in passing the stock over to the purchaser.

The petitioner used its stockholders as a channel or conduit for the passage of title from itself to the purchaser. This was a formalistic intermediate step in the sale; it was not germane to the main transaction. Such a step in the transaction of sale will be ignored and the sale will be treated as made by the petitioner. *S. A. MacQueen Co.* v. *Commissioner,* 67 F. (2d) 857 (C. C. A. 3d); *Hellebush* v. *Commissioner,* 65 F. (2d) 902 (C. C. A. 6th); *Burnet* v. *Lexington Ice & Coal Co.,* 62 F. (2d) 906 (C. C. A. 4th); *Taylor Oil & Gas Co.* v. *Commissioner,* 47 F. (2d) 108 (C. C. A. 5th).

The case of *Gregory* v. *Helvering,* 293 U. S. 465, relied upon by the petitioner (Br. 17), supports, rather than militates against, the Government's position herein. That case recognized that the steps taken by a taxpayer to evade or avoid income tax must be real substantial transactions. As we have pointed out above, income tax cases are determined by a consideration of the substance, rather than the form, of a given transaction. The method of avoidance used in this case is as unsubstantial and as lacking in reality as the method used in the *Gregory* case. The case of *United States* v. *Isham,* 17 Wall. 496, likewise does not militate against our contentions herein. The form, instead of the substance, controls in a documentary stamp tax case such as the *Isham* case. In other words, the stamp

tax is imposed upon the *form* of a document. What "the law permits" in a stamp tax case may not be permitted in an income tax case, and *vice versa,* by reason of the inherent differences between the two types of taxes.

The case of *Chisholm* v. *Commissioner* (C. C. A. 2d), decided July 8, 1935, not yet officially reported; but may be found in C. C. H. (1935), Vol. 3–A, p. 10,227, conflicts with the decision below on this point. The case is also in substantial conflict with *Gregory* v. *Helvering, supra.* We submit that the decision in the *Chisholm* case is unsound. A petition for certiorari was filed October 15, 1935, No. 519.

It is contended that the court below had no authority to decide that petitioner realized income from the sale because the issue presented to the Board of Tax Appeals was whether petitioner realized income from the dividend payment. We submit that the court below had the power and authority to consider and decide the case upon this theory. The assignments of error (R. 44) were sufficiently broad to bring before the court any theory, based upon the record, which would support the deficiency. The theory was based entirely upon the facts as stipulated, and was in support of the affirmative of the only issue in the case, i. e.: Was the amount of the deficiency correctly determined by the court? The method of arriving at the amount of the deficiency was not the issue. *Hughes* v. *Commissioner,* 38 F. (2d) 755, 757 (C. C. A.

10th); *Atlanta Casket Co.* v. *Rose,* 22 F. (2d) 800 (C. C. A. 5th). This Court has upheld the jurisdiction of Circuit Courts of Appeals to consider a cause upon a theory different from the one advanced before the trial tribunal. *Friend* v. *Talcott,* 228 U. S. 27, 36. The Circuit Courts of Appeals have frequently considered tax cases upon theories different from those advanced by the parties before the Board of Tax Appeals. This has been done at the instance of the Commissioner [*Childers* v. *Commissioner* (C. C. A. 9th), decided August 12, 1935, not yet officially reported, but may be found in C. C. H. (1935), Vol. 3–A, pp. 10,359, 10364; *Lewis-Hall Iron Works* v. *Blair,* 23 F. (2d) 972 (App. D. C.), certiorari denied, 277 U. S. 592; *Hurwitz* v. *Commissioner,* 45 F. (2d) 780 (C. C. A. 2d)], and at the instance of taxpayers [*Virginia-Lincoln Furniture Corp.* v. *Commissioner,* 56 F. (2d) 1028, 1033 (C. C. A. 4th); *Underwood* v. *Commissioner,* 56 F. (2d) 67 (C. C. A. 4th); *Seufert Bros. Co.* v. *Lucas,* 44 F. (2d) 528, 530 (C. C. A. 9th)]. In *Helvering* v. *Gregory,* 69 F. (2d) 809 (C. C. A. 2d), affirmed *sub nom., Gregory* v. *Helvering,* 293 U. S. 465, the Circuit Court of Appeals decided the case upon a theory different from the theories advanced on both sides. The cases relied upon by the petitioner (Br. 21) merely show that the question is one of practice and that this Court generally declines to consider a theory which has not been considered below. That it is a question of practice only, and does not involve a limitation

of judicial power, is clear from *Wuchter* v. *Pizzutti*, 276 U. S. 13; *Cole* v. *Ralph*, 252 U. S. 286; and *Chase, Jr.* v. *United States*, 256 U. S. 1.

When the trial tribunal has decided a cause upon one theory and the Circuit Court of Appeals has decided it upon another theory, this Court will consider both theories. See *Friend* v. *Talcott, supra.* We submit that the Circuit Court of Appeals had the right to consider the question upon the new theory and that this Court may consider both theories.

The petitioner insists that when the court decided that the facts showed the stockholders to be agents for the petitioner in making the sale (R. 58), it decided a question of fact (Br. 18–20). In this we submit the petitioner is in error.

Where the evidence is undisputed, the question of agency, its character and extent, are questions of law for the court. *Clark & Barker* v. *Eufaula Brick Works*, 205 Ala. 545, 547; *Masters* v. *Walker*, 89 Ore. 526, 530. Cf. *Whitson* v. *Pacific Nash Motor Co.*, 37 Idaho 204; *Fulton* v. *W. R. Grace & Co.*, 143 Va. 12; *Central Mortgage Co.* v. *Michigan State Life Ins. Co.*, 43 Okla. 33. This Court apparently treated the question of agency as one of law in *Willcox & Gibbs Co.* v. *Ewing*, 141 U. S. 627.

The court below was concerned with the ultimate conclusion as to whether or not the facts as revealed by the stipulation supported the Commissioner's determination. In reaching this ultimate conclusion the court took those facts and considered

their legal effect. This inquiry was concerned with the legal effect of the facts as agreed upon. This was a question of law which the court below had jurisdiction to decide on review. *United States* v. *Pugh*, 99 U. S. 265; *Winton* v. *Amos*, 255 U. S. 373, 395–396; *Botany Mills* v. *United States*, 278 U. S. 282; *Ox Fibre Brush Co.* v. *Blair*, 32 F. (2d) 42, 45 (C. C. A. 4th), affirmed *sub. nom. Lucas* v. *Ox Fibre Brush Co.*, 281 U. S. 115; *Cohen* v. *Commissioner*, 31 F. (2d) 874, 876 (C. C. A. 4th); *Iowa Bridge Co.* v. *Commissioner*, 39 F. (2d) 777 (C. C. A. 8th); *St. Paul Abstract Co.* v. *Commissioner*, *supra*, (p. 226). We submit that when the court below decided that the stockholders acted as agents for the petitioner in making the sale, it decided only a question of law.

CONCLUSION

The decision of the court below should be affirmed, either upon the ground that petitioner realized the income upon the dividend payment or that the sale should be attributed to petitioner.

Respectfully submitted.

STANLEY REED,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
LUCIUS A. BUCK,
Special Assistants to the Attorney General.

OCTOBER 1935.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 797, 815, 818:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

(c) *Amount realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

* * * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; * * *

* * * * *

Treasury Regulations 74 (promulgated under the Revenue Act of 1928):

ART. 69. *Sale of capital assets by corporation.*—Where property is acquired and later sold for an amount in excess of the cost or other basis, the gain on the sale is income. Where, then, a corporation sells its capital assets in whole or in part, it shall include in its gross income for the year in which the sale was made the gain from such sale computed as provided in sections 111–113 and articles 561–604. * * *

ART. 71. *Gross income of corporation in liquidation.*—* * *. No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition. * * *.

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